

Barclay Caterers, Inc. and Hotel Employees & Restaurant Employees Local 274, AFL-CIO. Cases 4-CA-18150 and 4-CA-18777

September 25, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On April 24, 1992, Administrative Law Judge David L. Evans issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs. The Charging Party filed a brief in opposition to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We note that the judge inadvertently dated the Respondent's refusal to meet and negotiate with the Union from March 13, 1989, instead of December 21, 1988, in his conclusions of law. We correct this error.

² In adopting the judge's finding that the Union represented a majority of employees in an appropriate unit, we note the following: even assuming, as argued by the Respondent in its exceptions, that the presumption in favor of the Union's majority status was rebuttable rather than irrebuttable, the Respondent failed to demonstrate that it had a good-faith doubt based on objective considerations of the Union's continued majority status. The Respondent cited its current lack of a collective-bargaining agreement with the Union; the employee turnover in the unit since the expiration of the contract on January 14, 1986; the decertification petition filed for the unit on March 9, 1990; and the Union's failure to produce documentary evidence of its majority status at the hearing.

None of these factors, individually or in total, establishes sufficient objective considerations to support the Respondent's asserted good-faith doubt. The absence of a current collective-bargaining agreement merely means that the contract is not a bar and that the issue of majority status may be raised. It does not show that majority status has been lost. Further, employee turnover, by itself, cannot be used as a basis for belief that a union has lost majority support since it is presumed that, in the absence of evidence that would justify a contrary conclusion, new employees will support the union in the same ratio as those whom they have replaced. Moreover, this is particularly true when high turnover is prevalent in the industry involved as is the situation here. See *Kelly's Private Care Service*, 289 NLRB 30, 43 (1988). Similarly, without a showing that a majority of employees supported it, the decertification petition by itself, cannot justify the Respondent's withdrawal of recognition. See *Alexander Linn Hospital Assn.*, 288 NLRB 103, 107 (1988). Nor does the Union's failure to produce documentary evidence of majority support show loss of that support. The Union was not required to carry the Respondent's burden on the issue of good-faith doubt. In addition, even

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Barclay Caterers, Inc., Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

were some sort of documentary evidence available, it would not necessarily have the evidentiary value the Respondent appears to urge. The Board has long held that majority support for a union is not to be, for example, confused with majority union membership. See *Atlanta Hilton & Towers*, 278 NLRB 474, 480 (1986).

Finally, not only has the Respondent failed to meet its burden of showing that its asserted good-faith doubt of majority status was based on objective considerations, it also raised that doubt while engaging in unfair labor practices. It is axiomatic that a defense of good-faith doubt about a union's majority status may only be raised in a context free of unfair labor practices. See *Nu-Southern Dyeing & Finishing*, 179 NLRB 573 fn. 1 (1969), enfd. in part 444 F.2d 11 (4th Cir. 1971). That is not the case here where the Respondent asserted doubt about the Union's majority status after unlawfully failing to bargain in good faith with the Union.

Henry R. Protas, Esq., for the General Counsel.
Richard H. Martin, Esq. (Astor, Weiss, & Newman), of Philadelphia, Pennsylvania, for the Respondent.
Michael N. Katz and Adam H. Feinstein, Esqs. (Meranze & Katz), of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. This case under the National Labor Relations Act (the Act) was tried before me in Philadelphia, Pennsylvania, on October 30 and 31, 1991. The charge in Case 4-CA-18150 was filed by Hotel Employees & Restaurant Employees Local 274, AFL-CIO (the Union) against Barclay Caterers, Inc. (the Respondent) on June 20, 1989. The charge in Case 4-CA-18777 was filed by the Union against Respondent on March 28, 1990. On those charges the General Counsel issued an order consolidating cases consolidated complaint and notice of hearing (the complaint) on May 21, 1990.¹ Respondent duly answered the complaint, admitting jurisdiction of this matter before the National Labor Relations Board (the Board), but denying the commission of any unfair labor practices as defined by the Act.

On the testimony and exhibits entered at trial, and my observations of the demeanor of the witnesses, and on the briefs that have been filed, I make the following

¹ A complaint had issued, separately, in Case 4-CA-18150 on August 31, 1989. As discussed *infra*, that separate complaint was withdrawn pursuant to certain settlement negotiations, and it is not a part of the formal documents in this case.

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation that maintains an office and place of business in Philadelphia, Pennsylvania, where it is engaged in the business of kosher catering. During the year preceding issuance of the complaint, in the course and conduct of that business, Respondent received gross revenues in excess of \$500,000 and provided services valued in excess of \$50,000 to customers located outside Pennsylvania.

Therefore, Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Allegations of the Complaint

The complaint alleges that, at all times material, Respondent has recognized the Union as the exclusive collective-bargaining representative of Respondent's employees in a bargaining unit that is described in the parties' most recent collective-bargaining agreement, the effective dates of which were January 15, 1983, through January 14, 1986. That unit description is:

[T]he Employer's cooks, kitchen employees, bartenders, waiters, waitresses, busboys, captains, [and] head waiters working in the [Employer's] establishment[,] or on a job hereafter operated or being serviced by the Employer or in any other establishment where the Employer may cater[,] in all matters relating to collective bargaining such as [employment of] employees, wages hours of work, working conditions and adjustment of grievances.

The answer admits that Respondent was a party to the 1983-1986 contract, but it denies the appropriateness of the contract's unit description and denies that the Union represents a majority of employees in any appropriate unit. Respondent's contention in this regard is that the unit description is inappropriate for bargaining because it does not exclude casual employees.

The complaint alleges that three categories of Respondent's conduct violated Section 8(a)(5). The first is that, beginning on December 21, 1988, and continuing to date, the Respondent has failed to provide requested information that is relevant to the process of bargaining for a successor agreement to the 1983-1986 contract. Second, the complaint alleges that from January 9, 1989, until March 14, 1990, Respondent failed and refused to meet at reasonable times and for a reasonable number of hours for the purposes of collective bargaining. Third, the complaint alleges that on March 14, 1990, Respondent "withdrew from an agreement reached with the Union during negotiations concerning a formula to be used to determine fringe benefit eligibility."

B. Bargaining History

Respondent is one of several kosher caterers in the Philadelphia area. In these operations, Respondent provides, at temples or other off-premises locations in the area, kosher food for bar mitzvahs, bat mitzvahs, and weddings. Leonard Hellinger is a 51-percent owner of Respondent and its presi-

dent, but he does not participate in the management of the corporation. All management responsibilities are vested in Larry Drossner, Respondent's 49-percent owner and corporate secretary-treasurer. Respondent's facility is a 78,000-square-foot building that houses an office and a commissary. Respondent employs six full-time employees at the commissary: two chefs, three pot and dishwashers, and a maintenance employee.

The events that Respondent caters are almost entirely conducted on weekends. As well as its six full-time commissary employees, Respondent employs part-time employees, called "extras," for weekend work. These part-time employees work onsite as dining room employees (waiters and waitresses) and bartenders. Some of these part-time employees work for Respondent many weekends per year. Others work only a few weekends; some only one weekend per year for Respondent. Drossner testified that the part-time employees who work more often for Respondent call in to see if work is available, and they are assigned work then. If there are not enough of those employees, Drossner must call others who have worked for him in the past. If he still cannot find a sufficient number of employees for a given weekend, he also calls persons whom he has only heard about (from those whom he has previously employed or anyone else). In the past, Respondent has also secured some needed part-time employees from a hiring hall operated by the Union.

Respondent has for many years recognized the Union as the collective-bargaining representative of all of its employees, full time, regular part time, and casual. The recognition of the Union has been memorialized in a succession of 3-year contracts. Initially, bargaining was through an association of Philadelphia kosher caterers, but in 1980 and 1983 Respondent signed separate agreements with the Union.

From the expiration of the 1983-1986 contract until early 1987, the parties engaged in some bargaining, but no contract was reached. On April 22, 1987, the Union filed 8(a)(5) charges alleging that, after expiration of the 1983-1986 contract, Respondent had refused to sign a completed successor agreement and that Respondent had failed to utilize the Union's hiring hall as required by the expired contract. The charge that Respondent had refused to sign a completed agreement was dismissed, but the General Counsel found merit in the hiring hall allegations. On April 28, 1988, the Regional Director approved a settlement agreement relating to the hiring hall charges, and the bargaining for a contract began anew thereafter.² It is that bargaining that gave rise to this case.

C. Facts

On May 4, 1988,³ Union Attorney Michael Katz wrote Drossner asking to "meet and continue" negotiations for a collective-bargaining agreement on "May 11, 12 (afternoon), 20, 25, 26 (morning), or 31 at [Katz'] office." By letter dated May 12, Drossner stated that his current and future appointments prevented his committing to a full day of negotia-

² Compliance with the settlement agreement is not an issue in this case.

³ Conduct prior to December 21, 1988, is outside the 6-month limitations period of Sec. 10(b) of the Act, and it cannot be used as a basis for independent findings, conclusions, or orders. Such conduct is included in this narrative only for purposes of background.

tions before the first week in July. On May 23, Katz wrote back that such a delay was unacceptable, and requested that negotiations begin on June 6. Drossner responded by letter of June 1, stating that he would be available during the mornings (only) of June 9, 15, or 20 at Respondent's office. Drossner explained his schedule to Katz and concluded:

As you can see during this time of the year I work every day and almost every evening except Tuesday, this being my one day off, and I think I deserve it.

Drossner testified that he did, and does, indeed work 7 days per week, either in the daytimes, or in the evenings, or both. On Mondays, Wednesdays, Thursdays, and Fridays, he works during the days at Respondent's facility. On Saturdays and Sundays he makes the rounds of the catered events. On Tuesdays, he takes off during the day, but he works Tuesday, Wednesday, and Thursday evenings, by calling on customers at their homes or at synagogues. Aside from Tuesday, daytimes, the only parts of his week that are not scheduled for business are: Monday evenings (when Drossner (now) sees his son), Friday evenings, and whatever is left of Saturdays and Sundays after the catered events are over and he has conducted necessary closing activities back at Respondent's facility.

Respondent's busiest periods are centered around religious holidays when Drossner is even busier, if anything. These periods occur four or five times a year, and last 1 to 2 weeks each.

By letter of June 9, Katz responded to Drossner's June 1 letter stating that the Union would accept June 15. Katz enclosed a contract that the Union had reached with one of Respondent's competitors, Norm the Caterer (Norm). Katz asked Drossner to communicate, before June 15, if Respondent could not accept any of the same terms in the Norm contract.

First Bargaining Session: June 15, 1988

On June 15, Katz, along with then Union President Jim Small, met with Drossner at Respondent's office. Katz testified that the meeting lasted 1 hour.⁴ First, the parties discussed another charge that the Union had filed and withdrawn; then they went to the issues between them. Katz asked what term of the Norm contract that Drossner could not agree to. Katz testified that Drossner listed as "open" matters: wages, eligibility for health and welfare and pension contributions, hiring hall procedures, hours of work, and retroactivity. Katz testified, "And I specifically asked him whether there were any other issues and he specifically told me that these were the only issues that needed to be resolved." Drossner testified that he told the Union that wages, pension eligibility, and the other topics listed by Katz were "some of the issues, but not all of the issues." Drossner's testimony on this point came after blatant leading, and Katz was the more credible witness. Therefore, I find that Drossner said nothing, even by implication, to indicate that Respondent doubted the majority status of the Union.

⁴The more important credibility issues will be discussed, but, except where noted, this narrative relies on Katz' testimony which I found credible and which, for the most part, was uncontradicted.

The Union informed Drossner of negotiations with another of Respondent's competitors, Betty the Caterer. Katz indicated that a draft contract had been reached; Drossner asked to be sent a copy, and Katz agreed.

Katz asked Drossner if he had any proposals; Drossner replied that he did not, and the meeting adjourned with agreement to meet on July 1.

Second Bargaining Session: July 1, 1988

A meeting was held on July 1, 1988. Drossner and Small attended, but Katz did not. Small did not testify; Drossner's testimony did not touch on this meeting and there is no record evidence of what happened.

Third Bargaining Session: December 21, 1988⁵

This meeting and all subsequent bargaining sessions were held at Katz' office. Attorney Richard Martin appeared with Drossner for Respondent. (Martin also appeared as counsel at trial, and he testified about what occurred at the bargaining sessions and what occurred between sessions.) Robert Baker, a new union president, appeared with Katz. (Baker testified, but not about any factual issues discussed here.)

Katz testified that he opened the sessions with demands for unpaid fringe benefit contributions under the (expired) 1983-1986 contract, demands for a retroactive agreement for the 1986-1988 period, and demands for a contract to begin in January 1989. Only the last of these three demands is involved in this case. (The parties never discussed the demand for a retroactive contract. The parties did discuss the demand for unpaid fringe benefit contributions, but only to the extent of the Union's demanding, and the Respondent's supplying, information necessary for an audit of Respondent's payroll for the 1983-1986 period.)

Martin proposed that any contractually established bargaining unit be composed only of employees who worked 24 hours per week or more. Drossner stated that, by Respondent's definition, the unit would include only 20 to 25 part-time dining room employees, in addition to the 6 commissary employees. Katz responded that there had never been such a minimum hours' requirement for inclusion in the bargaining unit, and that there could not be such a minimum because most of the employees went from job to job, working mostly weekends.

Katz asked for the names, job classifications, dates of work, and rates of pay of all employees whom Respondent had employed during the preceding year, and he stated that the Union would need this information to understand Respondent's proposal for a unit description limited by the number of hours that employees worked. Katz testified that "they" said that Respondent would "get back to us."

The parties went through the Norm contract, but no agreements were reached, according to this record.

The record does not indicate how long this meeting lasted; however, Katz credibly testified that no meeting which he attended lasted more than 2 hours.

Between the Meetings

On January 9, 1989, by letter of that date Katz requested: "the name, job classification, dates worked, and pay rates for

⁵See fn. 3.

all of Barclay's employees." Katz stated that the Union needed the information before the parties' next meeting. Katz further proposed meeting on January 23 or 25. Martin, in a letter dated January 12, responded that

Mr. Drossner attempted to retrieve the data from the computer and found that it could not be done pursuant to the existing program. However, he is attempting, through his accountant, to devise a program that will enable him to extract said data. As soon as this has been accomplished, the information will be forwarded to you.

Mr. Drossner will be on vacation during the latter part of January, 1989, and I will be on vacation for the first week in February, 1989. Therefore, the proposed dates are not satisfactory. Assuming I can provide the requested information to you this month, I believe a second meeting may be scheduled for mid-February, 1989. In the meantime, please provide me with alternative dates in that time period.

Martin followed with a letter dated February 27 suggesting a meeting date of March 8. With this letter Martin submitted a chart that had been created by Drossner. The rows of the chart listed employee numbers, but not names. In columns designating all weeks of 1988, the chart indicated a number of jobs (zero to four) for the listed numbers. The employee names represented by the numbers were not furnished. No other information was provided at the time.

After receiving that information, Katz called Martin. At some point a meeting date of March 13 was tentatively agreed on, but Katz' testimony is vague about what that tentative agreement was. On March 13, Katz waited in his office (with Baker) for an hour waiting for Martin and Drossner to appear. Katz credibly testified that he called Martin's office at 10 a.m. and a secretary told him that Martin was in California. No meeting was held.

The correspondence surrounding this aborted meeting is as follows:

On March 13, Martin wrote Katz:

I had rearranged my schedule and prevailed upon my client, Larry Drossner, to meet this morning with representatives of Local 274 for the purposes of negotiation. It is currently 9:30 A.M. and I have yet to hear from you as to whether you have been able to confirm the meeting for this morning. Therefore, I have advised my client that the meeting has not been scheduled so that he and I may attempt to reinstate our previous plans.

My client and I will be available to resume negotiations at a mutually agreeable time after March 24, 1989.

Also on March 13, Katz wrote Martin:

Your letter suggests that you and your client were in your office as of 9:30 a.m. on March 13, 1989. I called your office at 10:10 a.m. to inquire as to your whereabouts, having expected your arrival for our meeting. After certain delays where I was put on hold, your secretary returned to the phone and advised that you were not in and had departed for California. If there had

been any confusion concerning whether our meeting was confirmed, I would have expected some type of communication from you prior to the morning of our meeting. Be that as it may, I am amenable to rescheduling our meeting for after March 24 and in this regard offer the following dates: March 27, 28 or 31, 1989.

Martin responded by letter of March 23 stating:

When you called my office on March 13, 1989, I had not departed for California. I left on March 14, 1989. However, I was involved in other matters at that time. Moreover, I had advised my client on the preceding Friday that the meeting had not been confirmed. I was not confused.

Martin further stated that his trial schedule prevented Respondent's meeting with the Union until "the latter part of April" and asked Katz to "[p]lease let me know three (3) alternate dates so that I may confirm one of them. Keep in mind that [any] Friday is not an acceptable day of the week for my client."

Fridays are Drossner's busiest day of the week; on Fridays he supervises Respondent's final preparations for the week-end appointments which constitute the entirety of Respondent's sales.

On May 4, Katz wrote Martin to request a meeting on May 23 or 30 or June 1. By letters of May 8 and 10, Martin responded that he could not meet on May 23 or 30, but did agree to meet on June 1 at 2 p.m.

Fourth Bargaining Session: June 1, 1989

At this meeting only two issues were discussed: the requested information and the next meeting date. Katz told Martin and Drossner that the Union could not reply to Respondent's unit proposal without the information that it had previously requested; Katz repeated the Union's requests for employees' names, job classifications, rates of pay, and dates worked, and he further stated that the Union wanted the addresses of all employees. Martin then stated that the information would be provided if the Union paid all costs of retrieving it, something that Katz refused to do.

The Union asked for meeting dates during the following 2 weeks; Drossner replied that he would be too busy to meet any time before June 19. Martin stated that he would contact Katz during the following week to inform the Union when, after June 19, that Respondent could next meet. The meeting lasted about 1 hour.

Between the Meetings

On June 15, Katz wrote Martin that he had received no communication about subsequent meeting dates as promised on June 1. Katz further demanded the names, addresses, wage rates, classifications, and dates of hire of all current employees. Katz stated that the Union would not pay to retrieve and produce the information, but would accept copies of other records that contained the requested information, or the Union would go to Respondent's offices and copy the information from such other records. There was no response to this letter by June 20. On that date the Union filed the 8(a)(5) charge in Case 4-CA-18150. Katz sent Martin a copy of that charge by letter dated June 21.

On June 22, Martin sent Katz two letters. In the first, which Martin sent before he got Katz' June 21 letter (which enclosed a copy of the charge), Martin stated that he and Drossner would be available for negotiations on either July 6 or 10; Martin asked Katz to indicate which the Union would accept. Martin also stated that Respondent would provide

payroll information for its full time kitchen staff and regular part-time employees at the negotiations to be scheduled. My client does not believe you are entitled to any information for employees who have worked for Barclay Caterers on an irregular basis for such short periods of time such [sic] that they would not [sic] be considered "extra" or "casual" employees within any definition employed by the NLRB. To the extent that certain employees fall within a gray area in between, my client is willing to discuss and attempt to resolve such issues with the Union on a case by case basis. You have already been supplied with a list of employees (by numbered code) which shows the frequency of their employ and the number of hours worked over the past year. [The parentheses are in the original.]

Martin concluded this letter by offering to negotiate on the issue of including casual employees in the unit.

In Martin's second letter of June 22, he stated:

I was surprised that you felt the necessity of filing a ULP charge given the circumstances but, since you did, I believe it makes sense to have the NLRB determine the issues. Thereafter, you may feel more comfortable with the bargaining process.

By letter of June 27, Katz asked Martin if his second letter of June 22 was a withdrawal of Martin's offer to meet on July 6 or 10. Martin did not respond.

On July 14, Martin did write Katz that he and Drossner would be available for negotiations on July 19 and 31 and asked Katz to "[p]lease confirm a date and time."

On July 28, Katz responded that he could not meet on either date and offered to meet on August 7, 9, 14, 23, and 24. Katz further asked whether Respondent would provide the previously requested information.

By letter dated July 31, Martin asked Katz to let him know if the Union wished to inspect, prior to the parties' next meeting, information (unspecified) about employees whom Respondent considered to be full-and regular part-time employees. Martin further stated that, except for August 14, he was not available to meet on any of the dates suggested by Katz' letter of July 28 and that he would check with Drossner about August 14. Martin also stated that he would not be available for a 3-week period beginning September 5.

By letter dated August 3, Katz objected to Respondent's delays in meeting and informed Martin that he awaited a response to his request to meet, at least, on August 14. Katz further stated that the Union could come to Respondent's office to inspect information at any time during the week of August 7.

In a letter dated August 9, Martin wrote Katz:

I am advised by my client that the following dates and times are available for negotiations:

Thursday, August 24, 1989—Afternoon
Wednesday, August 30, 1989—Morning
Thursday, August 31, 1989—Afternoon

Please confirm one of the dates above for the next meeting. I hope to be able to provide you with the information requested, as qualified in my letter of June 22, 1989, prior to that meeting.

Martin made no reference to his prior suggestion of August 14 as a meeting date; he did not respond to the Union's offer to inspect documents during the week that had begun on August 7.

By letter dated August 11, Katz repeated his request to meet on August 14 and asked again for the information that the Union had begun to request in December 1988, and had continued to request through the parties' meeting of June 1. Martin did not respond.

On August 21, Katz informed Martin by hand-delivered letter that the Union agreed to August 31, as suggested in Martin's letter of August 9. Katz further requested production of previously demanded information before meeting on August 31.

Fifth Bargaining Session: August 31, 1989

There is no testimony about what happened at this meeting; Katz did not attend, and Martin's testimony does not mention the meeting. David Wolfe, then an associate in Katz' law firm, attended on behalf of the Union, but Wolfe did not testify. The parties stipulated into evidence a letter dated August 31, 1989, from Martin to Katz which was apparently given to Wolfe at the bargaining session of that date. Martin's letter states:

Presented herewith are the computer runs for the year 1989, which constitute all payroll records of Barclay Caterers for that year. You will note that only the employee names, wage rates per job, dates worked and social security numbers are included. Barclay Caterers maintains no list of employee addresses or job classifications.

The records produced by Respondent at the August 31, 1989 meeting were not placed in evidence. Presumably, they included all records that Martin's letter of August 31 represented to be enclosed.

Between the Meetings

On September 1, by letter of that date, Wolfe wrote Martin complaining that the records that had been produced the previous day had not included the employees' addresses, phone numbers, classification, or pay rates. Wolfe further asked Martin to contact Katz about further meeting dates, and further asked that Martin communicate before the parties' next meeting what issues were outstanding between the parties.

By letter of September 6, Martin told Katz:

I have confirmed with my client that the following dates are available for the next meeting:

Thursday, September 21, 1989—1:30 p.m.
Monday, September 25, 1989—1:30 p.m.
Wednesday, October 4, 1989—1:30 p.m.

Martin's letter made no reference to information requests (or anything else).

Katz responded with two letters of September 7. The first objected to the refusal of Respondent to meet before September 21. Katz requested a meeting on September 12 or 15, and he requested meeting on a weekly basis thereafter. Katz further repeated Wolfe's request for Respondent's specification of outstanding contract issues and Respondent's position on each.

In his second letter of September 7, Katz offered that the Union would "glean" any records that Respondent possessed to get the requested information. Katz stated that employers usually kept the records that had previously been requested, and he recapitulated the Union's requests:

So that there is no confusion, the specific information we desire includes the names, addresses, social security numbers and classifications for all employees, an itemization of all jobs worked including the date of each job, where applicable to employees such as kitchen employees who worked on a per diem as opposed to per job basis, the dates of all "days" worked, and the wages paid to all employees as reflected by your periodic payroll records in accordance with your normal payroll period.

Would you please advise when the above information will be provided.

By letter dated September 12, 1989, Martin replied to Katz:

I am in receipt of both of your letters dated September 7, 1989.

First, with regard to the proposed dates for negotiations, I am sorry that you choose to characterize the dates given for future negotiations as "unacceptable" and as representing "undue delays in meeting." Perhaps you do not realize that, except for one person in the office, Larry Drossner operates this entire business without assistance. His obligations to his customers require his personal attention both in and out of the office on a daily and nightly basis. In addition, on those occasions when Mr. Drossner does find free time to participate in negotiations, he must coordinate his time with mine. I am the only attorney in this firm with any knowledge or experience in the labor relations field. While I do not feel that either my client or I owe you an explanation, I am writing only in an attempt to make you realize that your needs and those of your client do not and will not supersede all other concerns of either Mr. Drossner or the undersigned. Our obligation is to bargain with Local 274 in good faith. We believe we have done so and we intend to continue to do so. However, I do not believe that obligation requires that either my client or his counsel agree to the dates you designate or which are convenient only to you and your client nor do I believe that good faith bargaining requires weekly meetings.

With the Jewish Holidays coming up, which is a busy period for my client, it is impossible to meet your demands for meetings and my client's business could suffer immeasurable damage if he attempted to do so.

The dates given to you were an attempt to balance many competing interests. I expect you and Local 274 to select one of those dates and to confirm the same with me forthwith. If you are busy on all three dates, let me know and I will explore other possibilities. By the time I received your letter of September 7, my schedule would not permit a meeting on Tuesday afternoon or on Friday, February [sic] 15, 1989.

With regard to the payroll records provided and those additional records for other years that were offered, I can only advise you that those are the payroll records. If there is a "type normally and customarily maintained by an employer," I must report that Barclay appears to be the exception. My client keeps no addresses or job classifications in his payroll runs nor is such information necessary to his business. You have already filed an unfair labor practice charge relating to the failure to provide records, I am certain the matter will be resolved in due course as a result of those charges.

By letter of September 18, Katz responded by objecting to the infrequency of meetings and stated that he was accepting both the September 25 and October 4 dates mentioned in Martin's letter of September 6. Katz further acknowledged that certain information (relating to the Union's claim for fund contributions under the 1983-1986 contract, not involved here) had been provided, and Katz suggested methods for reviewing the remaining information.

By letter of September 19, Martin stated that Respondent would meet when it was "mutually" convenient and that:

If you feel that my client is in possession of certain information which you are entitled, please identify with specificity the information your client wishes to see *and* the document known to you to contain the same. . . . My client does not maintain records containing job classifications or addresses. [Emphasis in original.]

With regard to the dates of the next meeting, my client offered alternate dates. Would you like September 25 or October 4?

Martin further asked Katz to identify what information the Union was still seeking.

By hand-delivered letter of September 20, Katz stated that Respondent had not provided job classifications for each employee, rates of pay, and dates of work. Katz further requested that the information be updated from to date. Katz pointed out that the addresses could be obtained from the employees' W-4 forms.

In the September 20 letter Katz selected September 25 from the two dates proposed by Respondent and stated:

With respect to our next meeting, I have already made clear that we desire to meet on September 25, 1989 at 1:30 p.m., at my office, in accordance with your prior correspondence. Given that you and your client have also made available the date of October 4, 1989 and hence apparently have no existing scheduling conflicts for that date, we further request to meet on October 4. We believe you have an obligation to do so but whether you agree to meet on that date is, at this

juncture, under your unilateral control. If you are refusing to meet on October 4 in light of the Union's confirmation of the September 25 meeting, then without prejudice to our position I offer to you the additional dates of October 5, 6, 11, 12, 1989 for further meetings after September 25. As I have previously noted to you, consistent with the requests made by David Wolf, Esquire on August 31, 1989 and as confirmed in this office's correspondence of September 1 and 7, 1989, I am still awaiting receipt of Barclay's statement of outstanding issues and proposals or position with respect thereto.

In a letter dated September 25, which Martin caused to be hand delivered on that date, Martin informed Katz:

Since you have apparently refused to select one of the three alternate dates proposed for our next meeting in a timely manner, I regret to inform you that September 25, 1989 is not available for a meeting.

Martin closed by stating that Respondent would meet with the Union on October 4 at 1:30 p.m.

By letter also dated September 25, and also hand delivered on that date, Katz protested the cancellation of that day's meeting, but agreed to the October 4 date. Katz further asked to have Respondent's proposals by October 2.

During the week before October 4, Respondent submitted to the Union a contract proposal which was complete except for health and welfare and pension issues. The proposed recognition clause excluded all "extra and casual" employees, which the proposal defined as those "who may perform bargaining unit work for the employer on an irregular basis, defined as less than fifty (50) jobs in any given calendar year." As previously noted, Respondent had recognized the Union as collective-bargaining representative of all Respondent's employees, regardless of the number of jobs they worked during a year.

Sixth Bargaining Session: October 4, 1989

The Union was represented by Katz and Bob Baker, the Union's president. Respondent was represented by Martin and Drossner.

Baker asked why the 1983-1986 contract between the parties could not serve as a basis for a new agreement. Drossner replied that, as well as wages, the parties had to deal anew with the issues of scope of the unit, hiring hall procedures, checkoff, and vacation pay for part-time employees. Drossner stated that the unit scope issue had to be determined before Respondent could make proposals on health and welfare and pension issues. The Union asked for a list of all employees who would be covered by Respondent's proposal for unit scope. Respondent agreed to provide that information after the meeting.

Between the Meetings

On October 16, Martin wrote Katz that he was enclosing "the list of employees who would be encompassed within the unit delineated in Barclay Caterers' most recent proposal." Martin's enclosure was an October 13 letter from Drossner to Martin stating:

Below you will find a list of employees of Barclay Caterers that would be covered by the scope of the proposed contract. These people are based on 1988 figures and estimated 1989 figures.

Drossner's letter then listed the names of 24 employees. Apparently by telephone conference, the parties agreed to meet on November 6, 1989.

Seventh Bargaining Session: November 6, 1989

Katz told Martin and Drossner that Respondent's proposal to exclude employees from the unit on the basis of jobs worked was unacceptable. The Union proposed, however, that casual employees would be considered part of the unit, but Respondent would not be required to pay fringe benefits unless an employee worked 21 jobs in a year.⁶ Martin counterproposed 40 jobs per year as a threshold for fringe benefit entitlement. No agreement was reached.

At some point in the November 6 meeting, Respondent stated that casual employees would not want to work for Respondent if they had to pay full monthly dues. Katz replied that casual employees would only be charged per diem dues.

After the meeting had gone on about an hour, either Drossner or Martin said that they had no more time for negotiations that day. Katz asked to meet on November 14, 15, and 16. Martin stated that he could meet on none of those days.

Between the Sessions

There were no meetings between the parties between November 6, 1989, and January 4, 1990. Katz testified that the parties used the month of December to prepare for trial of, and attempt settlement of, the unfair labor practice charges in this case.⁷ Those charges were at the complaint stage; the complaint alleged that Respondent was wrongfully withholding the following information about unit employees: names, job classifications, dates worked, and rates of pay.

On December 27, 1989, Katz wrote Martin that he would withdraw the charge underlying the then-outstanding complaint if Respondent would furnish the information specified in that complaint. By letter of December 29, Martin responded:

I wish to clarify an apparent misunderstanding. I advised the Board Agent at the NLRB, in response to his inquiry, that Larry Drossner would answer questions and clarify any information on the computer printouts (already supplied to you) that is either coded or not easily understood. . . . Finally, I indicated that Barclay Caterers would, upon request, attempt to compile the addresses for those employees whose names are identified on the October 13, 1989 list of core employees.

⁶As described by Katz in his testimony, the Union's proposal was: "If you were a dining room employee as opposed to a kitchen employee, you had to qualify by working 21 jobs in a year, and then from the 22nd job on, you would get paid your fringes, and then in the following year, you would continue to receive them and, at the end of that year, if you hadn't worked 21 jobs, then you would be disqualified and you would have to re-qualify in the following contract year."

⁷See fn. 1.

By letter dated January 3, 1990, which was hand delivered on that date, Katz asked that Respondent bring to the January 4 meeting the addresses of the "core" employees.

Also on January 3, the Union also delivered to Respondent a complete contract proposal. The Union proposed that it would represent all Respondent's employees. The proposal listed separate benefits for three categories of employees, steady, part time, and extra. The proposal defined "steady employees" as those who "receive pay from the Employer on a full time basis, regardless of the Employer's need." "Part-time employees" were defined as "all employees used by the Employer on a regular basis and who are paid on a per job or per day basis." "Extra" employees were defined as "all employees who are employed as needed on a per job or per day basis when the Employer's staffing needs exceed available steady and part-time employees."

The proposal included a provision that welfare and pension benefits applied to extra employees on the 21st "day/job" worked by such employees for Respondent or for any other employer who employed employees "within the jurisdiction of the Union."

Eighth Bargaining Session: January 4, 1990

The parties discussed employer contributions to union health and welfare and pension funds. Katz testified:

We then spoke more about the health and welfare and pension contributions, and we picked up on the threshold criteria that we had discussed the last time. The employer suggested a 35 job [per year] threshold, and we told them that that would be fine. That constituted a change from our initial proposal of 21, and their initial proposal of 40, and we specifically agreed that that would be an acceptable resolution.

Drossner and Martin disputed this testimony, as I will discuss later.

The meeting ended after about an hour when Martin and Drossner said that they had no other proposals to make, and that they had to leave.

Between the Sessions

On January 17, Martin submitted to Katz a proposal in response to the Union's January 3 proposals.

This was a complete contract proposal, the recognition clause of which provided:

the Employer's steady employees who are classified as cooks, kitchen employees, bartenders, waiters, waitresses, busboys, captains, hand head waiters, excluding extras and casual employees as defined herein . . .

The proposal does not define "extra" or "casual" employees. It does define "steady employees" as "those core employees of the Employer who receive pay from the Employer on a full-time basis." (Only the six commissary employees would have fit within that definition.) Following the recognition clause, the proposal defines "part-time employees" (as "all employees used by the Employer and paid on a per job or per day basis"), but the Union was not expressly proposed to be recognized as collective-bargaining representative of such employees.

Respondent's January 17 proposal contained a union-shop clause that applied only to steady employees, and the Union's hiring hall would be utilized only after "the Employer's list of part time employees [otherwise undefined] is exhausted."

Employee protections, such as those concerning layoff and discharge, apply only to steady employees. Rules (uniforms, appearance) apply to all employees. The contract did specify wages and other benefits for waiters and other weekend help, but, again, Respondent was not proposing that the Union would represent waiters or any other part-time employees.

Respondent's January 17 proposal made no health and welfare proposal, but it did provide, in regard to pensions:

Contributions for all part-time employees or new employees shall also be paid on a per-job/day basis (as applicable); however, no such contributions shall commence until the fortieth (40th) day/job . . .

Ninth Bargaining Session: January 18, 1990

At this session, the Union listed the remaining information that it wanted as a condition for withdrawing the then-outstanding unfair labor practice charges. Katz told Martin and Drossner that the Union wanted the names and addresses of all employees employed in 1989 and the classification of each employee. Katz pointed out that previously submitted information listed employees only by departments, such as kitchen or dining room employees; the Union could not tell if a kitchen employee was a cook or a dishwasher, and it could not tell if a dining room employee was a food server or a bartender. Katz further asked for an updated analysis of how many jobs each employee had worked during 1989; the figures that were previously given only covered through the previous July and was stale. Respondent promised to provide the information by February 5, a date the parties, at least tentatively, agreed to for their next meeting. Katz testified that, in return for the promise of information, the Union agreed to withdraw charges that supported a then-outstanding NLRB complaint.

The parties went through the Respondent's proposal which had been submitted to the Union the previous day. Although Katz testified that the Respondent had previously agreed to a 35-job threshold for welfare and pension benefits, he did not testify that he made any point about Respondent's 40-job threshold proposal that was then on the table. This has caused me concern in making a credibility resolution on the matter; however, because Katz was not interrogated about the matter, and given a chance to explain (his possible oversight at the bargaining session), I cannot conclude that there is a fatal inconsistency in his testimony.

The parties agreed to meet on February 5, Martin's trial schedule permitting. The meeting lasted about 1-1/2 hours.

Between the Sessions

Martin and Drossner, without informing the Union, did not appear for the February 5 meeting.

By letter of February 7, Martin transmitted to Katz a listing of 130 employees "who worked as of the year ending 1989." For 126 of these names, addresses were also listed. (No explanation was given for the lacunae.) The transmittal also included charts indicating the numbers of catered events

that each named employee worked during each week of 1989. Martin's cover letter closed:

Mr. Drossner will be prepared to review the work assignments of each employee at our [sic] next bargaining meeting. With regard to that meeting, I will make an effort to confirm the afternoon of February 12, although to date I have not been able to do so. As we discussed at our last meeting, I will be out of the office from February 15 through March 1, 1990. I am scheduled for depositions on February 13. I will let you know about the 12th as soon as I hear from Mr. Drossner.

Martin did not mention February 14, a Wednesday.

On February 8, Martin wrote Katz:

Today I received a call from Larry Drossner's mother, who advised me that Mr. Drossner is on vacation, out of state, until February 14, 1990. Therefore, I suggest we think about our next meeting for a date during early March. As you know, I will be out of the office from February 15 through March 1, 1990.

With regard to the materials that I forwarded to you with my letter of February 7, in addition to his review of the work assignments of each employee, Mr. Drossner will state the rates of pay for all of those employees.

After another exchange of letters Katz and Martin agreed that the next bargaining session would be on March 14.

Tenth Bargaining Session: March 14, 1990

Martin opened the meeting by saying that he could stay no more than 1 hour at the bargaining session because of a court-ordered deposition. The meeting lasted 1 hour and 15 minutes.

The parties reviewed Respondent's proposals and noted inability to agree on several sections because there was no agreement on which casual employees, if any, would be included in the unit. Those sections included: seniority, vacations, and pension and health and welfare. Some agreements were reached in other areas.

During the session, Drossner mentioned that the kitchen employees were covered by Blue Cross and Blue Shield. Katz asked for a copy of the plans and further asked for the names of the employees who were then covered. Katz testified that neither Martin nor Drossner replied.

On direct examination, Katz testified:

[T]hen, at that point, they informed us that on the question of the formula that we had discussed previously regarding eligibility for dining room employees, that they were back up to the number of 40 jobs that had been proposed in their contract, in their proposals, and that they would not agree to 35. . . . I commented that this was inconsistent with what had happened at the last sessions, and they indicated that that was [nevertheless] their position.

Katz testified that the only reason that Respondent gave for its change of position was that Respondent did not want "to pay for the people that they were calling part-timers."

Martin and Drossner testified that there was never an agreement on a formula of 35 jobs per year as a threshold for benefits, or inclusion in the unit. However, Martin's notes for January 4 state:

35 threshold ?? (not 21—not 50)

(The double underline of "35" is original.) Martin could give no explanation for his marks. He denied making the proposal of 35 as a threshold; he agreed that someone had; but he testified that he could not remember who it was.

Martin was incredible in his denial. The allegation that Respondent had reneged on a tentative agreement was not something first brought up at the hearing. It was made the subject of an amendment of the charge in Case 4-CA-18777 on May 3, 1990, as well as the complaint. That is, the matter was called to Martin's attention earlier, when his memory would have been fresh. When his attention was focused early on the matter, he would have recalled which version of this strenuously contested issue was the truth, and he would have remembered the truth thereafter. I believe that Martin was trying to hide behind the I-don't-remember shield as a last refuge of one who will not admit the plain truth: Respondent proposed the 35-job threshold, and there was agreement to it as Katz testified, and as Martin's notes corroborate.⁸

Drossner was no more credible than Martin; he appeared to be indulging in results-oriented testimony, and little more, at least on this point.

In summary, I credit Katz on this point.

As the meeting broke up, Katz asked for a commitment for the next meeting date. Martin refused and stated that he would contact Katz within 48 hours. Katz testified:

I reiterated that the Union was available any day of the week between 7:00 a.m. or [sic] 8:00 o'clock at night; that we were ready willing and able to meet any time, any day, anywhere; all I wanted to do was [have] regular meetings.

Martin did not reply to Katz.

After the Final Bargaining Session

By letter of March 20, 1990, Katz repeated to Martin his offer to meet at any hour in order to have regular meetings. Katz further repeated his request for information about the hospitalization plan maintained by Respondent, and a listing of the employees who were then covered. Finally, Katz asked for responses to his requests. Martin did not respond.

On April 20, Martin sent to Katz a letter (dated April 18) from Drossner to Martin. In his letter Drossner states:

Barclay Caterers, Inc., offers to its full time employees medical coverage consisting of Blue Cross \$250.00 Deductible Plan, Blue Shield 100 and Major Medical. Should you need any other information concerning these plans, feel free to call me at any time. I only have one set of booklets explaining these plans, so I cannot

⁸ Although specific interpretation is not required, I would find that Martin's notes indicated that neither Respondent's extreme proposal of 50, nor the Union's extreme proposal of 21, was being agreed to as a threshold, and a compromise of 35 was.

send it to you, but Blue Cross of Pa. could probably supply you with that.

Drossner also named the six (kitchen) employees who were covered by the plans.

On April 23, Katz again wrote Martin asking for a schedule of regularly held meetings and for meetings of longer duration.

On April 24, 1990, Martin replied to Katz stating:

My client, as you have been advised over and over, is a one-man operation, i.e. Larry Drossner. Although his mother helps out from time to time in the office, the entire business is administered by Mr. Drossner. He has met with you as often and, on each occasion, as long as the proper and efficient management of his business will permit. On some occasions, my schedule conflicts with the dates and times when Mr. Drossner is available. We do the best we can to be available for bargaining at "reasonable" times.

After referring to the unfair labor practice charge, Martin concluded:

I am sorry you and Local 274 chose to proceed in this manner. Perhaps it would be best to obtain a ruling from the NLRB relative to our good faith in the bargaining process.

Martin did not propose any dates for meeting or provide any information in his letter.

On December 17, 1990, by Martin's letter of that date to Katz, Respondent provided to the Union the hospitalization coverage booklets that the Union first requested on March 14, 1990.

Drossner testified on behalf of Respondent. He had, as he admitted, no notes or independent recollection of how long each bargaining session lasted; therefore, I have credited Katz' testimony in this regard.

On direct examination Drossner was asked about the names and addresses' issue:

Q. Did you turn that over to the Union?

A. Well, we eventually—eventually we turned over the records. I called up my accountant again [sic] and asked if there is anything in the computer that we can pull out, names and addresses and phone numbers, and he says he has nothing in [the computerized payroll files].

What I had asked him to do eventually is pull out names and addresses off the W-4's.

When asked on direct examination about his attempts to meet with the Union, Drossner further testified:

Well, I tried on the best of my part going through my scheduling that I have and my weekly work schedule, also, my appointments are usually made two weeks in advance, to try to schedule meetings as frequent as possible which would not interfere with my basic operating of my business. . . .

You [Martin, counsel for Respondent] would call me up and ask me what dates I had available and then you would tell me what dates you had available . . . how

your scheduling was, and then we would try and work things out the best that we could within our schedule together before turning that over to Mr. Katz.

D. Analysis and Conclusions

1. Majority status of Union

Respondent denies that the Union has requested bargaining as representative of employees in a unit appropriate for bargaining within the meaning of Section 9(a) of the Act. Respondent further denies that the Union represents a majority of employees in any appropriate unit.

At the hearing, counsel for the General Counsel cited as authority on both issues raised by these denials *Chemetron Corp.*, 258 NLRB 1202 (1981). In *Chemetron* the employer recognized the union as the collective-bargaining representative of two employees who had such dissimilar terms and conditions of employment that the Board, in the first instance, would not have found appropriate a unit composed of only them. The employer conducted one bargaining session at which it questioned neither the appropriateness of the unit nor the majority status of the union in that unit. Thereafter, the employer was presented with evidence that indicated that the union did not continue to enjoy a majority status in the recognized unit. On such evidence, the employer withdrew recognition. A charge was filed and an 8(a)(5) and (1) complaint issued.

The Board held:

This is not a case in which the Board is being asked to define an appropriate unit, to direct an election, or to certify the results of such an election, or to certify the results of such an election. It is therefore unnecessary to decide whether we would find the unit appropriate were the issue raised in such a context. As the Board has held:

The Board may appropriately issue a bargaining order covering a unit which it could not have initially certified under the Act, but concerning which the parties have knowingly and voluntarily bargained.³

Having voluntarily recognized and bargained with the Union as the collective-bargaining representative . . . Respondent argued for the first time at the hearing herein that the unit is inappropriate because the employees lack a distinct community of interest. We reject this belated attempt to repudiate the voluntary recognition.⁴ A contrary holding would fly in the face of our statutory obligation to promote stability in bargaining relationships.

³*Arizona Electric Power Cooperative, Inc.*, 250 NLRB 1132, 1133 (1980).

⁴*Berbiglia, Inc.*, 233 NLRB 1476, 1494 (1977).

In *Chemetron*, the Board further rejected the contention that the Board should consider evidence that the union no longer represented a majority of employees in the bargaining unit. The Board noted that:

It is well established, however, than after an employer voluntarily recognizes a union, the Union enjoys

an irrebuttable presumption of continuing majority status for a reasonable period of time.⁵

⁵ *San Clemente Publishing Corporation*, 167 NLRB 6 (1967); *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966); *Brown & Connolly, Inc.*, 237 NLRB 271, 275 (1978).

The period of time that the employer afforded for bargaining was held inadequate because, after granting recognition and conducting only one bargaining session, the employer delayed meeting with the union for a second session; then it withdrew recognition altogether. The Board observed that the single bargaining session that was conducted lasted only 45 minutes and stated:

Thus, aside from certain limited information provided during the 3-1/2 months prior to Respondent's withdrawal of recognition took [sic] place in a single 45-minute meeting. In evaluating the parties' bargaining history to determine whether a reasonable period has expired following a voluntary recognition, we look not simply to the passage of time, but also to the use the parties have made of that time. The Board has consistently declined to set arbitrary standards by which such negotiations might be judged. The single 45-minute session which was held here, however, would not constitute a "reasonable period" under any fair analysis.

The Board found a violation of Section 8(a)(5) because the employer had withdrawn recognition before a "reasonable period" of time for bargaining had elapsed following the voluntary grant of recognition.

Chemetron is indistinguishable from the case at bar. In *Chemetron* the employer withdrew recognition after a too-brief bargaining session. Here, as I find *infra*, immediately after resuming bargaining, necessarily recognizing the Union anew, Respondent began a course of unlawful delays and unlawful withholding of information. Therefore, under *Chemetron*, because of the violative conduct following the voluntary recognition, the Union's status as majority representative cannot be questioned here.

Despite its singular applicability of *Chemetron*, and despite the fact that counsel for the General Counsel cited *Chemetron* at the hearing, Respondent does not attempt to distinguish, *Chemetron* on brief. Instead, Respondent cites cases that turn on evidence not comparable to that in this case; i.e., none of the cases that Respondent cites involves an employer's voluntary recognition followed by a course of unlawful bargaining tactics. Therefore, the cases on which Respondent relies and certain evidence of lack of majority status on which Respondent relies,⁹ are insufficient, legally and factually, to rebut the presumption of the Union's majority status that arose at the parties first bargaining session on June 15, 1988.

Accordingly, I find and conclude that the Union has represented, and does represent, a majority of Respondent's employees, including casual employees, in the unit set forth in

⁹ This evidence is a blocked decertification petition and the inability of the Union to produce at the hearing, in response to Respondent's subpoena duces tecum, any documentary evidence of majority status.

the 1983–1986 collective-bargaining agreement between the parties.

2. Dilatory tactics

Section 8(a)(5) of the Act requires employers to bargain with collective-bargaining representatives such as the Union; Section 8(d) defines that duty:

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement.

The issue is whether Respondent has complied with this statutory duty.

The tempo of bargaining was determined by Drossner's response to the Union's first request after the settlement agreement of April 28, 1988. By letter of May 4, Katz requested that bargaining begin immediately. Drossner's initial response was that he could not meet for bargaining until late July, and that he would not meet for more than half a day. When the parties did meet, it was for only 2 hours, at the most. Substantial delays between the briefest of meetings became the pattern of negotiations that continued into the limitations period of Section 10(b).

The specific issue framed by the complaint is whether, since December 21, 1988, and continuing through March 14, 1990, Respondent failed to meet with the Union at reasonable times for purposes of negotiations.

The Union did everything but beg for meeting dates. However, as Martin's letters and Drossner's quoted testimony make clear, after December 21, 1988 bargaining session dates were agreed on only after all commercial necessities of Respondent, and all law practice commitments of Respondent's counsel, were considered and satisfied. The question arises: Did either the busy schedule of Drossner, or the busy schedule of Respondent's counsel, relieve Respondent of the obligation to meet for bargaining more often than it did?

Drossner is a busy man. However, the obligation to meet at reasonable times is not diluted by the demands of Respondent's business. In the case of *J. H. Rutter-Rex, Inc.*, 86 NLRB 470 (1949), the Board stated:

The obligation to bargain collectively surely encompasses the affirmative duty to make expeditious and prompt arrangements, within reason, for meeting and conferring. Agreement is stifled at its source if opportunity is not accorded for discussion or so delayed as to invite or prolong unrest or suspicion. It is not unreasonable to expect of a party to collective bargaining that he display a degree of diligence and promptness in arranging for the elimination of obstacles thereto comparable to that which he would display in his other business affairs of importance.

That is, Drossner was not privileged to subordinate to all other business considerations to Respondent's statutory obligation to meet and bargain with the Union at reasonable times.

Nor was Respondent free to evade its statutory responsibility to meet at reasonable times by employing as a representa-

tive an attorney (or anyone else) who could not meet at reasonable times. The “busy lawyer” defense has never been held to excuse a pattern of chronic delays between bargaining sessions. As stated in *NLRB v. Exchange Parts Co.*, 339 F.2d 829, 832 (5th Cir. 1965):

Respondents appear not to challenge that part of the Board’s order based on its findings that they adopted “delaying tactics in connection with the scheduling of meetings.” The record shows that only an average of 8 hours per month were consumed with negotiations during a period of 8 months covered by the record. It is plain that the negotiations were carried on primarily on behalf of respondents by a busy and successful lawyer, Mr. Harold Mueller. It is understandable that in a busy law practice some difficulty arises giving as prompt consideration to the requests of a representative of the opposing side as would entirely satisfy the latter. Nevertheless, we conclude that the inherent difficulty arising when a lawyer in full practice represents the employer in bargaining sessions does not exempt the employer from the normal requirements that nothing be done for the purpose of stifling an opportunity for discussion. There remains on the employer the positive legal duty to meet and confer with the Union at reasonable times and intervals.

All of which is to say that neither the “busy schedule” of Drossner, nor the “busy schedule” of Martin, nor the two “busy schedules” combined, provide an excuse for non-compliance with the obligation of Section 8(d) to meet for bargaining at reasonable times. Therefore, to the extent that substantial delays were attributable to the “busy schedules” of Drossner or Martin, there exists evidence of a violation of Section 8(a)(5).

On January 9, 1989, or about 2 weeks after the parties’ third bargaining session on December 21, 1988, Katz wrote Martin requesting a meeting for January 23 or 25, 1989. Martin, in his letter of January 12, refused, citing his vacation and Drossner’s vacations as reasons. Martin told Katz that Katz should request a mid-February meeting. The General Counsel does not question the sincerity of Martin’s statements that he and Drossner would be on vacation during late January and early February, and it must be concluded that, from the beginning of the 10(b) period until at least mid-February, there is no evidence of dilatory tactics on the part of Respondent.

There is also no evidence that Respondent was responsible for the delay between mid-February and the (tentatively scheduled) March 13 meeting date. Katz was obscure in his testimony about how a March date was established, and there is thus no way to conclude that the delay between the third session and March 13 is attributable to dilatory tactics by Respondent.

However, at one point during the 5-month period between the third and fourth bargaining sessions the parties did schedule, at least tentatively, a meeting for March 13. Martin’s letter of March 13 states that he was writing at 9:30 a.m. when he was in his office with Drossner; that he had been waiting to hear from Katz; and because he had not heard from Katz, he had informed his client that the meeting was canceled. Assuming that the arrangements had been made as Martin’s

letter implied, Respondent offers no excuse for Martin’s not calling Katz, when Drossner was available, rather than dismissing Drossner and writing Katz to say that the parties would not be meeting at all that day. In short, Martin seized on a misunderstanding, if he did not create it, to avoid meeting with the Union.

In his letter of March 23, Martin stated Respondent would not meet before “the latter part of April” and told Katz that he should request three alternatives for that period. Katz did not respond until May 4 when he proposed meeting on May 23 or 30 or June 1. Assuming that Respondent would have met in late April, of the 5-month delay between the third and fourth bargaining sessions, only the delay between March 13 and “the latter part of April,” or about 1-1/2 months, is attributable to Respondent’s or counsel’s “busy schedules.”

The meeting of June 1 lasted for 1 hour; then there was a 2-month interval between that meeting and the fifth bargaining session on August 31.

The 1-hour discussion on June 1 had two topics: Respondent’s failure to furnish information that had previously been requested and another meeting date. The Union asked to meet again within 2 weeks; Martin replied that Respondent could not meet before June 19, if then. Martin further promised to get back to the Union on when the next meeting date would be; he did not, until June 22 when he proposed to meet on either July 6 or 10. However, in a second letter of June 22, Martin states that he had received an unfair labor practice charge which complained of Respondent’s refusal to meet and that that charge should be allowed to run its course. Implicitly, therefore, Martin withdrew his offer to meet on July 6 or 10. On July 14, Martin did offer to meet on July 19 or 31. Katz was not available on either of those dates, but Katz suggested others, including July 14. Martin wrote back holding out the possibility of meeting on July 14; then he followed with another letter stating that Drossner was too busy to meet on that date. Martin offered August 31 which, out of apparent resignation, the Union accepted.

Assuming that Respondent would have met on July 19, had Katz selected that alternative, there was nevertheless an approximately 1-1/2-month delay between the fourth and fifth bargaining sessions, from June 1 until July 19, that was attributable solely to the “busy schedules” of Martin and Drossner. Then Martin seized on the inability of Katz to meet on July 19 to delay the next bargaining session until August 31. I therefore find that all the 3-month delay between the fourth and fifth bargaining sessions was attributable to Respondent’s relying on the “busy schedule defense” as a basis for not meeting with the Union.

There is no evidence of what preceded it, but by letter of September 6, Martin proposed half-day meetings on September 21, September 25, or October 4. By letter of September 7, Katz protested that September 21 was too late to wait for another meeting and asked for a meeting on September 12. It did him no good. Katz then attempted to accept both September 25 and October 4. Martin replied that “my client offered alternative dates. Would you like September 25 or October 4.” Respondent offers no reason, if it would propose both dates, it could not have met on both dates. Any residual notion that Respondent was taking seriously its duty to meet at reasonable times is disabused at this point.

Then, after Katz agreed to September 25, Martin and Drossner simply stood the Union up. Instead of meeting,

Martin sent Katz a terse letter stating that Katz' hand-delivered letter of September 20, in which Katz had (under protest) accepted September 25, was not "timely" enough. A more basic exercise of catch-me-if-you-can is difficult to imagine.

In his letter of September 12, Martin stated that "I do not feel that either my client or I owe you an explanation," but, to the extent he did explain, of the 1-month interval between the fifth and sixth bargaining sessions, at least half of the time (from the Union's requested date of September 12 to the actual meeting date of October 4) was lost because of Respondent's "busy schedule" and the refusal of Respondent to make a commitment to meet for more than 1 day at a time.

There is no evidence that the delay in meeting between October 4 and November 6, the dates of the sixth and seventh bargaining sessions, was attributable to Respondent. Nor is there any evidence that the delay in meeting between November 6, 1989, and January 4, 1990, the dates of the seventh and eighth bargaining sessions, was attributable to Respondent. Nor is there any evidence that the delay in meeting between January 4 and 18, the dates of the eighth and ninth bargaining sessions, was attributable to Respondent.

The parties had a meeting scheduled for February 5, Martin's trial schedule permitting. Martin was in trial, but did not inform the Union until afterward. This was another example of Martin's "busy schedule" preventing his meeting with the Union.

For the remainder of February, Drossner's annual vacation, and Martin's personal business of undisputed urgency prevented meeting. There is no evidence of why the parties did not meet during the first 2 weeks of March.

The final bargaining session, March 14, lasted 1 hour because of Martin's law practice. At the end of that meeting, and in a letter of March 20, Katz pleaded for a schedule of regular meetings, but Respondent refused, again, for no reason other than the "busy schedules" of Martin and Drossner. Katz' final plea for more meetings was met with a response by Martin that

the entire business is administered by Mr. Drossner. He has met with you as often and, on each occasion, as long as the proper and efficient management of his business will permit. On some occasions, my schedule conflicts with the dates and times when Mr. Drossner is available. We do the best we can to be available for bargaining at "reasonable" times.

Martin concluded:

I am sorry you and Local 274 chose to proceed in this manner. Perhaps it would be best to obtain a ruling from the NLRB relative to our good faith in the bargaining process.

Therefore, Respondent's last word was that it would not meet more often with the Union because of Martin's and Drossner's "busy schedules," and because of the unfair labor practice charges that had been filed, another impermissible reason for refusing to meet at reasonable times.¹⁰

¹⁰See *Dane County Dairy*, 273 NLRB 1711 (1985), and cases cited *infra*.

In summary, between December 21, 1988, and October 4, 1989, a 9-month period, the parties met four times for a total of 8 hours, maximum. Respondent caused delays between those sessions that totaled 5 months. There is no evidence that Respondent caused the delays between October 4, 1989, and February 4, 1990; however, a meeting tentatively scheduled for that date was canceled, without notice to the Union, because of Martin's busy law practice. The further delay in meeting between February 4 and the final meeting on March 14, 1990, was further attributable to counsel's busy law practice (and the personal business of counsel and Drossner's vacation). After the final meeting, despite repeated pleas for meetings by Katz, Martin refused, citing, again, the "one-man" nature of Respondent's operations, and further preempted any further meetings, citing the unfair labor practice charges filed here.

The cases are many that hold that even more frequent schedulings of negotiations have constituted unlawful delay. The violation is especially clear here where much of the little time that Respondent allowed for bargaining was spent attempting to get Respondent to comply with its statutory duty to furnish relevant information and its statutory duty to meet more often. Moreover, Respondent's refusal to schedule more than one meeting at a time is further evidence of bad faith. Finally, Respondent's using the charges as a basis for refusal of further meetings is an outright refusal to bargain which, itself, constitutes a violation of the Act.

It is therefore necessary to conclude, as I do, that from December 21, 1988, to the present, Respondent has failed to meet at reasonable times for the purposes of collective-bargaining with the Union, and has thereby violated, and is violating, Section 8(a)(5) of the Act.¹¹

3. Delay in furnishing information

Names and addresses of employees, like wage data, are presumptively relevant to the Union's role as collective-bargaining representative during contract negotiations,¹² and Respondent does not deny relevance here. Respondent argues only that all requested information was ultimately furnished and, therefore, no violation can be found.

Respondent did not satisfy its statutory bargaining obligation by providing relevant information whenever it got around to it. Respondent had a duty to furnish the requested information "without undue delay." *Fitzgerald Mills Corp.*, 133 NLRB 877, 879 (1961), *enfd.* 313 F.2d 260 (2d Cir. 1963). Where no reason is given, a delay as short as 20 days has been held to be a violation of Section 8(a)(5). *Butcher Boy Refrigerator Door Co.*, 127 NLRB 1360 (1960). In this case, the only reason Respondent ever gave for its refusals to furnish information was false: that it did not possess addresses of employees. As Drossner testified, the Respondent "eventually" had its accountant copy the addresses from the employees' W-4 forms, but only after months of delay.

¹¹*Captain's Table*, 289 NLRB 22, 23 (1988), on which Respondent so heavily relies, involved a "single unchallenged request to schedule a meeting on the first date all [the employer's] negotiators were available . . ." Here, Respondent refused to meet at any time that either Martin or Drossner was unavailable.

¹²*Georgetown Holiday Inn*, 235 NLRB 485 (1978), and cases cited *infra*.

The Union requested that the Respondent provide it with names, job classifications, dates worked, and pay rates as early as December 21, 1988. Beginning June 1, 1989, the Union requested the addresses of the unit employees. It repeated the requests several times, but not until August 31, 1989, did Respondent supply the Union with the names of the employees; on October 4, 1989, Respondent provided dates worked and wages, but not specific job classifications, which it never supplied.¹³ No names with addresses were supplied until February 7, 1990. All of that time, Respondent was contending that certain employees, who worked less than certain numbers of jobs, would be out of the unit, or at least have their benefits reduced. The information requested is always relevant, but, in view of Respondent's bargaining position, it was especially so in this case.

Accordingly, I conclude that by its delays and refusals to furnish to the Union the names, addresses, dates worked, and pay rates of unit employees, Respondent violated Section 8(a)(5) of the Act.

An additional informational issue remains. Respondent delayed from March 14 until December 17, 1990, to furnish to the Union copies of its Blue Cross health plan. Respondent stated to the Union, and it argues on brief, that the Union could have gotten the booklets from Blue Cross. The lawful answer to a request for information is never "look elsewhere." Respondent had the booklets; it could have made copies, or it could have called Blue Cross and had others sent to it, or to the Union. It was not on the Union to accept Respondent's representation that it subscribed to one plan, and for the Union to go and get a copy of a booklet for that named plan, then attempt to bargain on the assumption that it had gotten the right booklet from a third party, Blue Cross. The Union requested a copy of the plan that Respondent was providing for the commissary employees, and Respondent had a duty to furnish it. *Milgo Industrial*, 229 NLRB 25 (1977), enf. denied 567 F.2d 540 (2d Cir. 1977).

Accordingly, I conclude that by its delay in furnishing to the Union the requested booklets describing current health and welfare benefits, Respondent violated Section 8(a)(5) of the Act.

4. Withdrawal from a tentative agreement

I agree with the General Counsel that Respondent agreed at the January 4, 1990 bargaining session that part-time employees would be covered by welfare and pension plans after working 35 jobs, then, by its written submission of January 17, and by statements at the March 14 bargaining session, Respondent withdrew from that agreement.

I do not agree, however, that this conduct constituted an independent violation of Section 8(a)(5). There is no authority for the proposition that a party is bound, through the course of bargaining, to all tentative agreements.

The General Counsel cites two cases as authority. In *Natico, Inc.*, 302 NLRB 668 (1991), the agreement in question was not a tentative agreement on one term of a multiterm contract that was being negotiated, as here. In *Natico*, the employer reached an agreement to implement, for a period of 60 days, an incentive plan if the bargaining unit employees agreed by ratification vote. The agreement in

¹³ Respondent's submission of some numbers without names on February 27, 1989, was meaningless.

question was that, if the employees approved a 60-day trial period for the incentive plan, the trial period results were to be the basis for the parties' future contract negotiations. Without any valid basis, the Respondent reneged and refused to participate in arranging the referendum by employees, as it had agreed. The Board found a violation because the employer's tactic subverted the entire bargaining process. Similarly, in *Arrow Sash & Door Co.*, 281 NLRB 1108 (1986), the other case cited by the General Counsel on this issue, the employer reneged on a series of tentative agreements, without giving any valid reason. The Board found a violation because the employer's pattern of reneging constituted a tactic to stultify bargaining altogether. Here, there was only one act of reneging on a tentative agreement; not a pattern of such conduct. Moreover, Respondent did give a reason—it did not wish to pay such benefits to part-time employees, according to Katz' testimony. Therefore, this case is similar to one that the Board distinguished in *Arrow: Merrell M. Williams*, 279 NLRB 82 (1986). *Merrell M. Williams* involved, as here, a withdrawal from a single tentative agreement. In *Merrell M. Williams*, the employer gave only the reason of economics, the same reason that was given here. The Board found no violation, as it would find none here.

Accordingly, I find that the General Counsel has failed to prove this alleged violation.

CONCLUSIONS OF LAW

1. The Respondent, Barclay Caterers, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Hotel Employees & Restaurant Employees Local 274, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The following unit of Respondent's employees, which unit is set forth in the parties' last expired collective-bargaining agreement, effective by its terms for the period January 15, 1983, through January 14, 1986, is appropriate for bargaining under Section 9(b) of the Act:

The Employer's cooks, kitchen employees, bartenders, waiters, waitresses, busboys, captains, and head waiters working in the Employer's establishment, or on a job hereafter operated or being serviced by the Employer or in any other establishment where the Employer may cater, in all matters relating to collective-bargaining such as employment of employees, wages hours of work, working conditions and adjustment of grievances.

4. At all times relevant to this case, the Union has been, and is now, the exclusive collective-bargaining representative of the employees in the unit referred to in paragraph 3, above, within the meaning of Section 9(a) of the Act.

5. Respondent has violated Section 8(a)(5) and (1) of the Act by:

(a) Refusing, on and after December 21, 1988, to furnish to the Union, without undue delay, requested information that was relevant and necessary for the purposes of collective bargaining.

(b) Refusing, on and after March 13, 1989, to meet and negotiate with the Union as the collective-bargaining representative of the employees in the unit described above at reasonable times.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. The General Counsel has not established by a preponderance of the evidence that, as alleged, Respondent has otherwise violated the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁴

ORDER

The Respondent, Barclay Caterers, Inc., Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to furnish to Hotel Employees & Restaurant Employees Local 274, AFL-CIO, without undue delay, requested information that is relevant and necessary for the purposes of collective bargaining.

(b) Refusing to meet and negotiate with the Union as the collective-bargaining representative of the employees in the unit described above at reasonable times following requests by the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, furnish to the Union, without undue delay, information that is relevant to and necessary for the purpose of collective bargaining.

(b) On request, meet and negotiate with the Union as the collective-bargaining representative of the employees in the unit described above at reasonable times.

(c) Post at its Philadelphia, Pennsylvania facility copies of the attached notice marked "Appendix."¹⁵ Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized rep-

¹⁴If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁵If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

resentative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to furnish to Hotel Employees & Restaurant Employees Local 274, AFL-CIO, without undue delay, requested information that is relevant and necessary for the purpose of collective bargaining.

WE WILL NOT refuse to meet and negotiate with Hotel Employees & Restaurant Local 274, AFL-CIO, as the collective-bargaining representative of the employees in the following described unit at reasonable times following requests by the Union:

The Employer's cooks, kitchen employees, bartenders, waiters, waitresses, busboys, captains, and head waiters working in the Employer's establishment, or on a job hereafter operated or being serviced by the Employer or in any other establishment where the Employer may cater, in all matters relating to collective-bargaining such as employment of employees, wages hours of work, working conditions and adjustment of grievances.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, furnish to the Union, without undue delay, information that is relevant to and necessary for the purpose of collective bargaining.

We will, on request, meet and negotiate with the Union as the collective-bargaining representative of the employees in the unit described above at reasonable times.

BARCLAY CATERERS, INC.